IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL REPLY BRIEF FOR PETITIONERS

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Introductory

Petitioners have previously filed a timely joint reply brief. Oral argument on this case was postponed from the week of October 21, 1968, to November 12, owing to illness of Government counsel. The Clerk advised us of this postponement by telephone on October 21. Later that week we telephoned the Clerk to ask whether, in view of the postponement of the argument to November 12, we might properly submit a supplemental reply brief which we stated we planned to do by that weekend or early in the week of October 28, and the Clerk's office instructed that such supplemental reply brief should be served and filed as soon as possible. Then on October 28 the Court decided *Fuller* v. *Alaska*, No. 249, 37 U.S. Law Week 3157. The short report of the *Fuller* decision in the New York Times on the night

of October 28-29 alerted us that the retroactivity problem in our case (concerning *Katz* v. *United States*, 389 U.S. 347) might be substantially affected by the non-retroactivity ruling of *Fuller*, *supra* (relating to *Lee* v. *Florida*, 392 U.S. 378). We did not receive in the mail until October 31 our *U.S. Law Week* and our *Criminal Law Reporter* issues containing the text of the *Fuller* decision. This supplemental reply brief is being finished for transmittal to our printer today, November 7, which is just one week since we received our copies of the *Fuller* decision, and this supplemental reply brief will be filed and personally served by messenger in Washington tomorrow, November 8, which is four days before the oral argument presently scheduled for November 12. Rule 41(3) allows filing of reply briefs "up to three days before the case is called for hearing". Since this is a *supplemental* reply brief, i.e., since we have already filed one reply brief, and since as aforesaid we had previously promised the Clerk (before *Fuller* came down) that we would submit our supplemental reply brief early in the week of October 28, we are concerned to justify the delay in the filing of this supplemental reply brief, hence the foregoing detailed explanation. We trust that the Court will take into consideration the quite possibly major impact of the *Fuller* decision on the retroactivity problems of our case and that our presentation in this supplemental reply brief aims at thorough coverage of the new subject matter so very recently brought into the picture by the *Fuller* decision.*

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* We note also that the October 28 action of the Court in deciding *Fuller* on the merits, occurred by *per curiam* ruling without *prior* granting of certiorari or scheduling of argument, which would sooner have alerted the Bar that *Fuller* might be of imminent decisional significance.

This supplemental reply brief will also treat a topic which would have been the sole subject matter of this supplemental reply brief before the intervening decision in *Fuller* came down (see II, *infra*).

I. The effect of *Fuller* v. *Alaska*, No. 249, on the Katz retroactivity issues.

The *Fuller* decision, *supra* (October 28, 1968), holding that *Lee* v. *Florida*, 392 U.S. 378, is to be applied only to state criminal trials in which evidence violative of 47 U.S.C. §605 is sought to be introduced after the date of the decision in *Lee*, contains reasoning and has connotations which, we realize, are arguably unfavorable to our position that *Katz* v. *United States*, 389 U.S. 347, should be held applicable to our case.

Let us first summarize what we think are the salient items in the *Fuller* decision, in relation to the *Lee* decision; as part of the following summary we shall quote the main reasoning portion of *Fuller;* after finishing this summary and quotation *re Fuller*, we shall take up in more detail the several points which need extended discussion.

Lee involved a form of telephone wiretapping—an installation for intercepting conversations on a party-line telephone—and the Court there held that this violated §605, the Court overruling *Schwartz* v. *Texas*, 344 U.S. 199.

Fuller involved introduction in evidence of a *telegram* allegedly sent by petitioner Fuller to an accomplice.* *Fuller*

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* We indicate in detail, *infra*, that this Court's decision in *Fuller* is silent as to any of the factual circumstances concerning the prosecution's obtaining of this telegram, and we supply *infra* facts relating thereto which we think are relevant for present purposes.

apparently treats the *telephone* wiretapping in *Lee* and the *telegram* incident in *Fuller* as calling for no differentiation from the standpoint of §605.

Neither in *Lee* nor in *Fuller* did this Court rule on the question of whether State conduct in violation of §605 is also a violation of the Fourth Amendment. In *Lee* the Court expressly declined to reach the Fourth Amendment issues (as well as Fourteenth Amendment issues) (*Lee* v. *Florida*, 392 U.S. 378, , fn. 2, 20 L. Ed. 2d at 1169, fn. 2). In *Fuller* the Court did mention the Fourth Amendment, but only by way of an analogy concerning a policy aspect of *Mapp* v. *Ohio*, 367 U.S. 643 and *Linkletter* v. *Walker*, 381 U.S. 618, 639, i.e., the policy of exclusionary rulings "designed to enforce the Federal Law", the Court stating in *Fuller* that this policy was common to *Lee, Fuller, Mapp* and *Linkletter;* thus *Fuller's* references to the Fourth Amendment do not decisionally change the fact that *Fuller* (also *Lee*) is grounded exclusively on §605, and not on the Fourth Amendment as such. See, *infra,* our argument that significant constitutional distinction derives, for the purposes of the retroactivity-prospectivity problem, from the fact that our case is a Federal and a Fourth Amendment case, while *Lee* and *Fuller* are State and §605 cases.

The entirety of the reasoning of the Court in *Fuller* on the retroactivity-prospectivity question will be quoted (37 U.S. Law Week at 3158):

> "Prospective application of Lee is supported by all of the considerations outlined in *Stovall v. Denno*, 338 U.S. 293, 297.[1] The purpose of *Lee* was in no sense "to enhance the reliability of the fact-finding process at trial." *Johnson v. New Jersey*, 384 U.S. 719, 729. Like *Mapp v. Ohio*, 367 U.S. 643, *Lee* was

designed to enforce the federal law.[2] *Linkletter v. Walker,* 381 U.S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible.

Retroactive application of *Lee* would overturn every state conviction obtained in good-faith reliance on *Schwartz.* Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*

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[1] These considerations were more recently applied in *DeStefano* v. *Woods,* 392 U.S. 631, 633, in which we concluded that the right to a jury trial in state criminal prosecutions under *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, was prospective only.

[2] *Lee* v. *Florida,* 392 U.S., at 386-387:

"We conclude, as we concluded in *Elkins* and in *Mapp,* that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law "in the only effectively available way — by removing the incentive to disregard it.' " *Elkins* v. *United States,* 364 U.S., at 217."

With the above summary and quotation of the *Fuller* decision in mind, let us now examine in more detail whether the *Fuller* prospectivity ruling concerning *Lee v. Florida,* is authority for a ruling that *Katz* v. *United States* should likewise be held to have only prospective effect either generally or for our case.

First, a preliminary word about the reasoning of the *Katz* decision itself: There are very strong indications in the *Katz* decision that, already built into the language of that decision, so to say, is the element of retroactivity. This

latter theme was indeed suggested by us in our opening brief (pp. 87-88), but we purposely did not elaborate this theme in our opening brief because, we reasoned to ourselves, it seemed that if the Court already itself considered *Katz* to require retroactivity the Court would not merely have granted certiorari in our case for argument of the retroactivity question but would have reversed and remanded the case upon the granting of the certiorari. Now, however, in the light of *Fuller* v. *Alaska* and, more particularly, in light of what we deem the several manifestly intrinsic differences between *Fuller-Lee* and the *Katz* type of situation, we think it is proper for us to present plenary argument in support of our above mentioned theme of the "built-in" retroactivity ruling contained in the *Katz* decision itself, the theme which until now we have not pressed with the benefit of full argument.

The item in the *Katz* decision which we cited in our opening brief (pp. 87-88) as denoting such "built in" retroactivity, was the Court's rejection in *Katz* of the Government's argument that because its agents had relied on *Olmstead* v. *United States*, 277 U.S. 438 and *Goldman* v. *United States*, 316 U.S. 129, the Court should retroactively validate the agents' conduct, the Court stating, "That we cannot do. * * * [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather than presenting to "a neutral magistrate", the agents' claimed belief that they had proble cause to conduct their electronic activity.

It is strikingly pertinent to this last quoted language of the Court in *Katz*, that in the oral argument in this Court on October 14, 1968, in *Butenko* v. *United States*, No. 197, as reported in 4 *Criminal Law Reporter* 4053 (October 23, 1968, Vol. 4, No. 4, Section 4), the following described colloquy

took place between the Chief Justice and the Solicitor General:

> "The Solicitor General commented that in Katz, the electronic eavesdropping was legal at the time it was done.
>
> The Chief Justice noted that if that was true it would have been likely that the Supreme Court would have followed the precedent."

Further pursuing this same theme—of the "built in" retroactivity effect of the *Katz* decision itself—we would now recall to the Court that the *Katz* decision pervasively abounds, it is practically saturated, with items of ruling and reasoning which overwhelmingly bespeak that the Court in *Katz* conceived that essentially it was applying *existing* law of the Fourth Amendment, indeed that it was applying the single most vital Fourth Amendment principle, the very central axiom of the Fourth Amendment, long and unquestioningly assumed by everyone as being the heart of the Fourth Amendment, namely, the requirement of advance judicial approval for a search warrant. Except for the fact that *Katz* also did involve an express overruling at last of *Olmstead* and *Goldman, supra,* one may read the *Katz* decision in vain for any hint that the Court deemed itself to be laying down "new law"; and as to those overrulings, the *Katz* decision strongly articulates also that *Olmstead* and *Goldman* had long since lost their authority by erosion effected through a series of pre-*Katz* decisions incompatible with *Olmstead* and *Goldman.*

Thus, at 389 U.S. , 19 L. Ed. 2d 582-583, the Court in *Katz,* in rejecting the Government's test of "physical penetration", commented that this test "was *at one time* thought

to'' be controlling (italics added). Similarly, at 389 U.S. , 19 L. Ed. 2d 583 the Court, again speaking in a past sense of constitutionally established principle pre-dating *Katz*,, stated that this test ''has been discredited'', citing *Warden* v. *Hayden*, 387 U.S. 294, 304. In similar vein, i.e., referring to the ''penetration'' or ''trespass'' tests as having lost authority pre-*Katz*, the Court said of the *Olmstead* case that ''we have since departed from the narrow view on which that decision rested'', and then the Court went on to quote the well known language from *Silverman* v. *United States*, 375 U.S. 505, 511, rejecting the test of ''technical trespass under . . . local property law'' (389 U.S. at , 19 L. Ed. 2d at 583). Still again, in this same vein, the Court referred in *Katz* (389 U.S. at , 19 L. Ed. 2d at 583) to the pre-*Katz* non-trespass standards by speaking of them as a pre-*Katz* accomplished decisional fact, the Court using the language ''Once this much is acknowledged'' in referring back to those pre-*Katz* development. Next, at 389 U.S. , 19 L. Ed. 2d at 583, the Court wrote the following words which, we submit, constitute the plainest possible speaking that so called non-trespassory electronic eavesdropping was violative of the Fourth Amendment pre-*Katz*:

> ''We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarding as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth

> Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.
>
> The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. * * *"

Immediately following the above quotation the Court in *Katz* went on to describe and consider the Government's position "that its agents acted in an entirely defensible manner" with respect to the above quoted question posed by the Court of "whether the search and seizure conducted in this case complied with constitutional standards" (389 U.S. at , 19 L. Ed. 2d at 583-584).*

The thereafter immediately next following portion of the *Katz* decision (389 U.S. at , 19 L. Ed. 2d 584-585), is too lengthy to quote here, as it includes extended footnotes by the Court; we summarize: The Court reasoned that, assuming the Government's agents had so behaved that they could have obtained a judicial warrant within the meaning of the pre-*Katz* decisions (the Court citing *Berger* v. *New York*, 388 U.S. 41; *Osborn* v. *United States*, 385 U.S. 323; *Ker* v. *California*, 374 U.S. 23; *Lopez v. United States*,

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* It deserves to be emphasized, we submit, that in the portions of the *Katz* decision above quoted and discussed, not only was the Court itself speaking of whether there had been compliance with "constitutional standards" plainly assumed to pre-date *Katz*, but also the Government in taking its litigational stand before this Court in *Katz* apparently found it appropriate to address itself to a showing that its agents had complied with pre-*Katz standards* that were not dependent on the "trespass" theory. We respectfully again emphasize, both this Court and the Government in *Katz* understood that one quite possible decisional direction portended by *Katz* was that this Court might well rule for petitioner *Katz* on the basis of pre-*Katz* non-trespass law; and in fact that was exactly what happened in *Katz* when the Court announced its decision (as we read the *Katz* case).

373 U.S. 427; *Nordelli* v. *United States*, 24 F. 2d 665), the conduct of the Government's agents nevertheless could not now be retroactively validated, for the reasons which we noted *supra, viz.*, that there had been no advance scrutiny and approval by a judicial officer on the issue of probable cause. In this last mentioned portion of the *Katz* decision (see 389 U.S. at 19 L. Ed. 2d at 585) the Court's reasoning in *Katz* struck perhaps its strongest note (as we earlier suggested) of insistence upon the applicability of the long-established pre-*Katz* Fourth Amendment standards (advance judicial approval of search warrants). This retrospectively established posture of the Fourth Amendment principles which the Court evidently deemed applicable in *Katz* is vividly expressed, for example, by the following language of the Court in which the Court spoke plainly in terms of pre-existing (i.e., pre-*Katz*) law (389 U.S. at , 19 L. Ed. 2d at 585):

> "* * * 'Over and again this Court has emphasized that the mandate of the [Fourth]Amendment requires adherence to judicial processes,' *United States* v. *Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

In the above quotation in *Katz* we see the Court using such expressions as that "over and again" the Fourth Amendment requirement of "adherence to judicial processes" had been "emphasized" by the Court long before *Katz;* and that, apparently, so securely and long established had this pre-*Katz* Fourth Amendment principle become, that searches in violation of this principle—which the Court was de-

claredly applying in *Katz* as a principle declaredly long pre-dating *Katz*—or searches of the *Katz* type in violation of this principle were "per se unreasonable under the Fourth Amendment" (see the quotation immediately above).

Also interesting in the *Katz* decision—with reference to our same above theme that *Katz* was decided on pre-*Katz* Fourth Amendment law—is the portion of the *Katz* decision which follows immediately after our last given quotation, *supra*. That quotation ended, as seen, with a reference to "well-delineated exceptions", i.e., exceptions to the long-established Fourth Amendment principle requiring advance judicial approval for searches. The Court then went on (389 U.S. at , 19 L. Ed. 2d at 585-586) to point out that none of those exceptions could be applicable to electronic searches, and then the Court used the following significant language: "The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case" (389 U.S. at , 19 L. Ed. 2d at 586). The "exception" which the Government wanted was that electronic surveillance of telephone booths should be exempted from "the usual requirement of advance authorization by a magistrate upon a showing of probable cause" (*ibid*). The Court rejected this request of the Government (*ibid*), but what we would here especially note is that, in this part of the *Katz* decision, there appears once again the absolutely taken-for-granted idea, on the part of both the Court and the Government, that the *Katz* electronic activity of the Government's agents had to pass the muster of the pre-*Katz* Fourth Amendment "basic principles" (*supra*), and that the only escape from this for the

Government in *Katz* would be "the creation of a new exception to cover this case" (*supra*). Could there be any clearer indication that the *Katz* decision was grounded on pre-*Katz* law? For indeed the Government itself implored the Court in *Katz* to lay down a new, *prospective* "exception" to enable the Government to overcome the pre-*Katz* established law of the Fourth Amendment for the purpose of enabling the Government to win that case.

We therefore submit that this Court might now well wish to reconsider the terms of its order granting certiorari in our case, by now deciding, without need for further elaborate consideration of the retroactivity-prospectivity question herein, that by reason of the "built-in" retroactivity element in the *Katz* decision itself the proper ruling for our case should be now a ruling amending the original order of grant of certiorari to include a reversal of the judgment of the Court of Appeals, and to include also such order of remand as the Court may consider proper, on the authority of the decision in *Katz* v. *United States*, 389 U.S. 347, without more; that is, without further argument or consideration being required.*

Second, returning now to the pertinent details of *Fuller* v. *Alaska*, *supra*: The *Fuller* ruling of prospectivity for

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* We take it that the oral argument presently scheduled for November 12, 1968 will go forward as scheduled. Needless to say, we shall be happy to forego the argument if, after reading this supplemental reply brief, the Court should determine to grant the above suggested amendment of the order allowing certiorari herein. We realize that the practicalities of the Court's scheduling arrangements for its oral argument docket make such an outcome unlikely at this stage. However, we do most respectfully stress our above suggestion that this case can now be summarily disposed of on the basis of the "built in" retroactivity elements in the *Katz* decision as above argued.

Lee v. *Florida, supra,* involves the effect of 47 U.S.C. §605 on State criminal trials. More precisely, however—and more importantly—while *Lee* v. *Florida* involved the effect of §605 on State telephone *wiretapping, Fuller* v. *Alaska* involves only the effect of §605 on State seizure *of telegrams.* This Court in *Fuller* did not treat this telegram factor as importing any difference, for §605 purposes, as between telegrams and telephone conversations. But we respectfully submit that there is or may very well indeed be an important difference, for the purpose of determining whether *Fuller-Lee* unfavorably affects our retroactivity hopes in the present case. Let us note the text of 47 U.S.C. §605:

> § 605. UNAUTHORIZED PUBICATION OR USE OF COMMUNICATIONS
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and

no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

Cardinal to the argument which we are now to advance—in support of our theme of a significant §605 difference between seizure of telegrams and tapping of telephones—is the first clause-sentence of the above quoted statutory language, that is the clause or sentence ending with the words "or on demand of other lawful authority;". Immediately preceding these concluding words of the sentence or clause in question are the words "or in response to a subpoena issued by a Court of competent jurisdiction". These last quoted words referring to "subpena" and "demand of other lawful authority" are of prime interest for present purposes—that is, for the purposes of our within effort to distinguish *Fuller-Lee* from *Katz-cum*-our case.

In the first place, the entire opening sentence-clause of §605 to which we refer shows on its face that, at least primarily, the statutory subject matter involved consists of *written* "communication by wire or radio"; this interpretation that the statutory reference is to *written* "communication" is supported, in fact necessitated, by the whole express wording of said opening sentence or clause and by its several specific portions as well. The whole generic situation envisaged by this statutory language is one envisaging *telegrams, cablegrams, radiograms,* i.e., written telegraphic communications. The textual exegesis of this statutory language could be elaborated at great length, but we think no such lengthy elaboration is needed. A few examples from the statutory language will serve the purpose. Thus, the opening words referring to "no person *receiving* * * * or *transmitting* * * * any * * * communication by wire or radio" can hardly refer to telephone calls, but obviously must refer to written telegraph-type items. Similarly, the prohibition against divulging or publishing the "existence, contents" etc. "except through authorized channels of *transmission* or *reception*, to any person other than the addressee, his agent or attorney" or to persons "employed or authorized to *forward such communication to its destination*", can only sensibly refer to written communications sent "by wire or radio". And like exegesis yields the same results as we comb word by word through this opening sentence or clause of §605.

Now, what is the significance, for present purposes, of this plain reading of the opening sentence or clause of §605 as being addressed to written telegraphic communication? The significance lies in the previously noted concluding

words of that sentence or clause, the words which expressly allow divulgence or publishing of the communication "in response to a subpena issued by a Court of competent jurisdiction, or on demand of other lawful authority". In other words, the opening sentence or clause of §605, when applied to written telegraphic-type communications (as we contend this statutory provision must apply), expressly allows the divulgence or publishing of a telegram upon proper subpena or upon other proper demand of lawful authority. *Fuller* v. *Alaska* involved a telegram. The Court's *per curiam* decision in *Fuller* v. *Alaska* is silent as to any of the circumstances which led to the obtaining or divulgence of that telegram in Mr. Fuller's trial in Alaska.

But suppose that the telegram in *Fuller* was obtained and divulged pursuant to lawful subpena or "demand of other lawful authority"? Suppose that the record itself in *Fuller* shows, or colorably supports, the conclusion that there did exist such subpena or other lawful demand in that case? Suppose, in other words, that, notwithstanding the silence of this Court's *per curiam* decision in *Fuller* on these quite possibly dispositive questions of fact and statutory impingement (§605), the facts disclosed by the certiorari record in *Fuller* as filed in this Court were to reveal affirmative answers to all of our above suppositious questions? Would it not then follow that this Court's whole action in having accepted the *Fuller* certiorari presentation as ostensibly affording a proper occasion for deciding the extremely important question of the retroactivity-prospectivity of *Lee* v. *Florida* was jurisdictionally and procedurally *improvident;* and that, accordingly, *Fuller* v. *Alaska* would have to be re-examined by this Court with intensest close-

ness to determine whether that case can stand on this Court's books as a decisional precedent for this vital area of the law?

We think we are in a position to state that the answers apparently indeed are affirmative to our above supposition-formulated questions. In the short time between the rendering of this Court's decision in *Fuller* v. *Alaska* and the completion of this supplemental reply brief, we have made diligent effort to find out what the *Fuller certiorari* record as filed in this Court shows concerning these questions. We have not been able to work out the physical arrangements for personal inspection by us of the *Fuller* record. But we have conducted lengthy long-distance telephone conferences with certiorari counsel for petitioner Fuller, who was kind enough to review his copy of the record at our request with an eye towards advising us of the contents of the record on the points here in question.

Through those telephone conferences we are informed that the prosecution in the *Fuller* trial represented to the trial Court that they relied on having had a subpena or subpenas for the obtaining of the telegram from the Fairbanks, Alaska office of the Alaska Communications System which was the telegram receiving station; that this subpena was, apparently in the first instance, a grand jury subpena; that there might also have been trial Court subpena process after the grand jury subpena; and that in any event, alternatively, the prosecution represented that it relied on voluntary disclosure by officials of the Alaska Communications System (a Government agency) who in turn were or may have been acting under a Federal administrative regulation pertaining to such disclosures.

In our aforementioned telephone conferences with certiorari counsel for petitioner Fuller we were cautioned that the *Fuller* certiorari record is in some respects unclear as to just how the telegram was obtained by the Alaska prosecutive officials; as petitioner Fuller's counsel cautioningly phrased it in speaking to us, the record is "muddy". But there is apparently no doubt that some kind of subpena process was utilized, or was represented by the Alaska prosecutor as having been utilized.

A further *caveat*, kindly conveyed to us by petitioner Fuller's certiorari counsel, is that the record is apparently silent as to use of any subpena process in obtaining the copy of the telegram from the originating office of Western Union at Spokane, Washington; the only express record reference to a subpena is to the Fairbanks Alaska receiving station, involving the aforementioned Alaska Communications System. See *Fuller* v. *State*, 437 P. 2d 772, 773-774 (S. Ct. Alaska 1968).

Petitioner Fuller's certiorari counsel has also advised us that the certiorari record indicates that apparently no distinct issue was litigated, in the trial Court, with reference to the apparent non-subpena status of the Spokane copy of the telegram as distinct from the apparent subpena-status of the Fairbanks copy of the telegram; but that, however, the Spokane copy was brought before the trial Court through the manager of the Spokane Western Union office; the Fairbanks, Alaska copy having apparently been brought into the case through the testimony of a Lieutenant Colonel Swett of the Alaska Communications System.

It appears also that much if not all of the record "muddiness" concerning this subject occurred because the parties

were largely preoccupied, at that stage of the *Fuller* case, with questions as to the admissibility of the telegram on grounds of materiality, identifiable connection with the defendant, questions of search and seizure, and questions of compliance with Federal administrative regulations of the Alaska Communications System—in other words, not primarily on grounds deriving from 47 U.S.C. §605.

According to our information received from Fuller's certiorari counsel as aforesaid, the "muddy" facts above summarized emanate from the Fuller certiorari record at pages 232-240 (and possibly et seq.) and 636-647 (and possibly et seq.).*

All of our above discussion of the opening sentence or clause of §605, and of the indicated use of the subpena process in the *Fuller* case, has proceeded on the theory that the law of §605 as to exclusion of written *telegram* evidence is not and cannot be the same as the law of §605 as to exclusion of *telephone wiretap* evidence. Also, obviously the express subpena provision of the opening sentence or clause of §605 can only refer, in turn, to such *written* communications. It does not refer, and in the nature of things it cannot refer, to telephone wiretap evidence. We do not know how one would go about "subpenaing" telephone conversations.

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* Counsel herein, being severely pressed for time in completing this supplemental rely brief and in preparing for the oral argument to be held November 12—and being a "one man" practitioner handling this case alone without access to assistance from co-counsel, all of whom advise that their participation in this certiorari proceeding is without fee—regrets the inexactness of the above description of the *Fuller* record. Counsel expects to be able to examine that record in person in Washington before the oral argument herein on November 12.

How, then, can *Fuller* v. *Alaska* serve as a decisional vehicle for deciding the question of the retroactivity or the prospectivity of *Lee* v. *Florida*? How can a case (*Fuller*) where, indicatedly, the seized telegram was *lawfully* seized by subpena or "demand of other lawful authority" pursuant to express lawful authority given by §605,* be used by this Court for the drastic purpose of resolving the important retroactivity issue of §605-barred *unlawful* telephone wiretap evidence or other §605-barred evidence in State criminal trials (*Lee* v. *Florida*)? At the least, how can the *telegram* facts of *Fuller* supply this important decisional occasion without at least an express consideration by this Court of the indicated record facts of *Fuller* concerning the subpena factor which might well make *Fuller* decideable on a ground which would make it unnecessary ever to reach the *Lee*-retroactivity §605 issue?

We hasten to add that we are not for one moment suggesting that, in a case properly presenting the issue of a *telegram* interception, divulgence or publishing, without benefit of the statutory justification of subpena or "demand of other lawful authority", the exclusionary evidentiary protections of §605 ought to be any less available than in a *telephone wiretap* case. On the contrary, aside from the peculiar provisions of the opening sentence or clause of §605 (which, however, in turn reflect the peculiar conditions surrounding a written communication as distinct from words spoken on a telephone), it is undoubtedly true that all of the remaining provisions of §605 which forbid interception, divulgence or publishing of communications are equally applicable to telegrams and to telephone conversa-

* We pass here the threshhold question of the constitutionality of the §605 subpena procedure.

tions. Such is undoubtedly true, we think, even though there seems to be a surprising paucity of authority on the telegram aspect under §605. See 53 A.L.R. 1485, 66 A.L.R. 397, 134 A.L.R. 614, and "Blue Book" supplements.

Even more scarce seem to be the authorities on the subpena provision of the first sentence or clause of §605 (relating to telegrams). But on this latter point the statutory language seems so clear, that we believe we are correct in our above argument—to the effect that if, as indicated, *Fuller* v. *Alaska* involved a subpena, the issue of violation of §605 is not necessarily reached in that case, and consequently that case cannot necessarily soundly be used to enunciate a prospectivity decision with respect to *Lee* v. *Florida*. Or, at the very least, *Fuller* cannot soundly be so used without first considering in the most thoroughgoing way the whole statutory-interpretation problem of the subpena provision of §605, and without first also threshing out thoroughly the apparently unclear record facts of *Fuller* relating to the subpena item.

Further supporting our above suggested distinction between the telegram provisions and the telephone wiretap provisions of §605, may be mentioned considerations of the sort which were prominently discussed in the *Katz* and *Lee* decisions, namely, the varying or relative values or degrees of Fourth Amendment protection given to different kinds of privately-intended communications of individual declarants. The familiar distinction in this regard, as noted in *Katz* and *Lee*, is that between the privacy of the home and the non-privacy (or the lesser privacy) of the "open field". Similar distinguishing considerations may readily be contemplated with regard to private oral words on one hand and private written telegrams on the other hand.

Under the privacy-intention test which is prominent in the *Katz* decision especially, it would surely seem that all possible Fourth Amendment protection should be given to the individual who does *all he possibly can* to keep his words private, as by confiding the words only to a trusted friend in the private seclusion of his own home. On the other hand, the *Katz* privacy-intention test does not suit nearly so effectively for the protection of the man who chooses to impart his supposedly private words to the institutional echelon channels of a telegraph company.

For our own part, we would like to see the telegraph sender protected equally with the private home conversationalist (or the telephone speaker) against any snooping in violation of the Fourth Amendment. But the legal-constitutional reality seems to be that there are gradations of Fourth Amendment protection under which the telegraph-sender may stand less favored than other types of private word-declarants.

To the extent that such gradations do exist in our law at the present time, our above argument that *Fuller* v. *Alaska* is not a proper vehicle for deciding the prospectivity-retroactivity question under *Lee* v. *Florida*, gains support from the existence of those gradations in the law.

In referring just now to Fourth Amendment aspects we had no intention of blurring the fact that *Fuller* v. *Alaska* and *Lee* v. *Florida* rest not on the Fourth Amendment but on a statute (§605), whereas *Katz* and our case do rest on the Fourth Amendment. We turn next to this latter important distinction.

Third, then, as we noted earlier, *Fuller* and *Lee* are purely §605 cases; the Court explicitly declined to reach the Fourth

Amendment issue in *Lee*, and the Court's analogy references in *Fuller* to *Mapp* as being similar to *Lee* in having been "designed to enforce the Federal law" still leave *Lee-Fuller* as resting in §605 rather than on the Fourth Amendment. Since, nevertheless, the Court in *Fuller* did thus analogize *Lee* with *Mapp*, and partly for that reason the Court declined to make *Lee* retroactive, and since *Mapp* did involve Fourth Amendment values and not only the statutory §605 values, we realize that it is probably going to take some arguing to persuade this Court that our own Fourth Amendment values (deriving from the *Katz* Fourth Amendment values) are still worthy of favorable consideration on the retroactivity issue notwithstanding the *Fuller* treatment of *Mapp* in analogy to *Lee*.

Our further argument for this purpose is:— To begin with, we would again invoke our presentation *supra* where we urged that the *Katz* decision itself embodied a "built in" retroactivity conclusion based in the most direct way on the Fourth Amendment essence of judicial control of search warrants.

Further, and really as an outgrowth of the point just mentioned, we would urge that while the pre-*Mapp* law had its *Wolf* v. *Colorado*, 338 U.S. 25, and while the pre-*Lee* law had its *Schwartz* v. *Texas*, 344 U.S. 199, the pre-*Katz* law had no such "prior-reliance" millstone case to cut from around its neck. Is not this precisely why *Katz* is so conspicuously worded throughout in terms of a pre-*Katz* body of Fourth Amendment law which the Government's agents in *Katz* were found to have violated?

Fourth, even in the *Mapp* situation, as translated by *Linkletter* v. *Walker*, 381 U.S. 618, for prospectivity-retroactiv-

ity purposes, cases pending on appeal at the time of the *Mapp* decision were given the benefit of that decision.

Fifth, we referred above to the factor of reliance on prior decisions, as distinguishing *Mapp-Linkletter* and *Lee-Fuller* from our case *cum Katz*. *Fuller* speaks also, as seen, of *Mapp* and *Lee* as both being "designed to enforce the Federal Law". These words in *Fuller* suggest that the Court's concern is with prevailing upon the *States* to abide by the Federal Law. The delicate problems of federalism, upon which we dwelt extensively in our opening brief, and which are again connoted in the above mentioned language in *Fuller,* are not present in our case *cum Katz*. We submit that this is a quite possibly dispositive distinction between our case and *Fuller-Lee,* and not less so when consideration is had of the judicial duty to exercise the supervisory power over the administration of Federal criminal justice; and the more so, furthermore, when consideration is had, once again, that the value which is going to be either vindicated or sacrificed in our case—depending on how the retroactivity-prospectivity question is decided—is that constitutional value which the Court evidently regarded in *Katz* as being so securely enshrined under pre-*Katz* law, namely, the rock-bottom Fourth Amendment value of judicial control of search warrants.

Sixth, Fuller-Lee differ from our case in another fundamental respect. The Court in *Fuller* said that the purpose of Lee was not to enhance the reliability of the fact-finding process, but was, again, rather to enforce the federal law. We think we have shown in our opening brief and in our previous reply brief, that there is most pronouncedly an issue in our case as to reliability of the fact-finding process,

both because of the unsatisfactory condition of the alleged Waldorf Astoria tapes, and because underlying moral (and therefore constitutional) questions troublingly affect our case by reason of the Government's resort to an intrinsically odious method of investigation and the indications of extremely questionable honesty of the investigative personnel in their conduct of, and subsequent testimonial description of, the electronic snooping.

But we also realize that none of these latter considerations can assuredly avail to fend off the ultimate thrust of what appears to be the Court's basic stand in *Fuller*, that evidence seized in violation of statutory or constitutional prohibitions may be "relevant and reliable." Again, therefore, we must fall back upon our suggestion, in our prior briefs herein, and referred to in our immediately preceding paragraph, that, to put it simply, the overall decency of the "fact-finding process", and not only the relevance and reliability of that process, ought to be considered. *A fortiori*, this last is worthy of consideration in the framework, again, of the *Katz* decision's staunch declarations in favor of a pre-*Katz* Fourth Amendment ban against electronic searches carried out behind the backs of the judiciary.

Seventh, the final reason stated in *Fuller* for the prospectivity ruling is the undesirability of upsetting a large number of State criminal convictions. This circumstance does not apply in our case. The Government has acknowledged that there are not a large number of cases that would be affected by a retroactivity ruling for *Katz*, although the Government urges that some of the cases (including this one) are very important. This issue has been much threshed in the prior briefs herein and need not be further argued now.

Eighth, in concluding this argument on the *Fuller-Lee* problem, we are obliged to refer once again to what we above termed the "built in" retroactivity ruling of the *Katz* decision itself. As seen, *Lee,* as glossed by *Fuller,* has been reasoned by this Court as having nothing to do with the Fourth Amendment as a decisional ground, as having only to do with §605, and as simply affording no justification whatever for retroactivity because the purpose of *Lee* was merely to enforce compliance with the Federal law. We hope we may be pardoned for expressing our sadness over the fact that the references in *Lee* (quoted from *Nardone* v. *United States,* 302 U.S. at 382, 383) to telephone wiretapping as denoting unethical standards and governmental conduct destructive of personal liberty, find no echo in *Fuller* and that instead *Fuller* is reductively worded down to a minimal expression favoring the rather colorless aim "to enforce the Federal Law". We intend no disrespect, but it almost seems as though the tone of ethical affirmation which the Court struck in *Lee* (as in *Katz*) has now somehow generated an opposite pendulum swing towards ethical tonelessness in *Fuller.* Our interest in speaking thus is not merely one of some sort of judicial-literary criticism. Our interest is not even one of immediate partisan advocacy at this moment. Our concern is that if, *via* a decision in our case, *Katz* should be held not retroactive, *Katz* itself may perish in even its "prospective" chance of viability. No one needs to labor the unhappy truth that this country is today passing through an era of slippage of its energies of ethical character. *Katz* was a very great ethical declaration. The ethical power of *Katz* resides *par excellence* not in judicial oratory or preaching, for *Katz* neither orates nor preaches. The power of *Katz* lies in its absolutely admirable jurisprudential qualities, in its combination of un-

assailable legal history, all-around impeccable scholarship, creative judicial technique and implicit judicial fearlessness to declare constitutional policy. If we are correct in our reading of *Katz*, as we developed the reading at some length earlier in this brief, *Katz* says that, long before *Katz*, it was constitutionally wrong for the Government to engage in non-trespassory electronic eavesdropping without complying with the Fourth Amendment. That saying in *Katz* is the real courage, and the real constitutional and social good, of the decision. The courage and the good of a decision like *Katz* are not in the judicial saying that, 'from now on, of starting now, we are all going to be more courageous and more good'. The courage and the good lie in the stalwart judicial saying that 'we have been wrong, all of us (or most or many of us), for at least some time now in our unconstitutional behavior, behavior which the Constitution has forbidden to us for at least some time now, and we are now not only going to try to act better for the future but we are going to give up the benefits of our past bad conduct'. Since *Katz* depends totally, throughout its entire essential reasoning, on the positing of *past* (pre-*Katz*) Fourth Amendment requirements, what chance does *Katz* have of governingly affecting the constitutional behavior of law enforcement officials if the Court should now (in this case of ours or in some other case soon to come) repudiate its own declared *raison d'etre* of constitutional courage and constitutional honor for the *Katz* decision, by announcing to the country that the retrospectively recognized points of constitutional principle that gave birth to *Katz* do not have enough constitutional life in them to support a ruling of retroactivity for *Katz* in regard to other cases, few though those cases are (by the Government's own admission),

and not even for the minimal number of those cases which were still pending on direct appeal when *Katz* was decided?

II. Supplementing our previous reply brief treatment *re* the issues as to legality of the Waldorf-Astoria eavesdropping under pre-*Katz* standards.

The grant of certiorari in this case was not limited. Our questions included, in addition to the *Katz*-retroactivity question and other questions which we shall not further refer to herein, three "questions presented" which raised issues as to the pre-*Katz* constitutionality of the Waldorf-Astoria room bug (see Questions 3, 4 and 5 as formulated in our opening brief, pp. 4-7).

Thus, our position in this case on the electronic eavesdrop issues does not depend entirely on the *Katz*-retroactivity outcome. This case involves unconstitutional electronic eavesdropping, or at least it involves an unsatisfactory governmental negation of unconstitutional electronic eavesdropping, under pre-*Katz* standards.

In our previous reply brief we left unanswered one topic in the Government's brief which requires reply. We refer to the Government's treatment at pp. 56-57 of its brief, where the Government discusses the question of why the microphone allegedly located in the agents' own room did not apparently pick up intrusive sounds originating in the agents' own room. This portion of the Government's brief is short; and we shall quote it because we wish to reply to it in detail, sentence by sentence (G. Br. 56-57):

> "* * * The microphone, which was placed next to the floor on the agents' side of the first door, was shielded

> from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211-3213; Gov. Exhs. 3, 4). Moreover, instead of being set for automatic operation by means of the sound-actuated switch, the recorder was operated manually by agent Kiere whenever he wanted to make a recording (R. 374, 658-661, 669-670, 3215-3216, 3225-3226), and the door to the bathroom was kept closed on those occasions (R. 373, 668-668a, 3215-3216). Finally, the short-wave radio, typewriter, tape playback mechanism, and generally the telephone, were used before and after, but not during the recordings of conversations (R. 700, 702-704, 857-858, 930-932). In the few instances where the telephone was used during a recording the tape contained noises evincing such use (see, e.g., R. 594-595, 620, 660)."

In the above quotation from the Government's brief the first sentence, to the effect that the microphone "was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel" is not supported by the Government's record references. The Government cites R. 3211-3213, and Exhibits 3 and 4. The exhibits are merely photographs, proving nothing. The cited record pages 3211-3213, far from depicting any purpose to "shield" "sounds originating in the agents' room", consist merely of testimony by agent Durham that he put adhesive tape on the microphone in order to enhance its capacity as "a collector of sound, directing the sound into the microphone itself" (R. 3211-3212); and the only measure Durham said he took to prevent unwanted sounds from entering into the microphone was the draping of the bathroom towel around the microphone, because he was concerned about this problem "after discovering that by any

one moving around in this room they would cause sound to enter from this room into the microphone"; agent Durham did not even say that the towel invariably remained in position, but only that "usually" it remained in position (R. 3212-3213). It does not require very much of a knowledge of "electronics" to know that a "bathroom towel" is scarcely going to do much good as a hermetically or acoustically sealing device for closing off sounds from an allegedly highly sensitive eavesdrop microphone. Durham's story of the towel as having created the effective muffling device is simply ridiculous on its face. We respectfully invite the Justices of this Court to drape a bathroom towel over their own telephones and experience whether there is any appreciable muffling of sound at all; and a conventional telephone instrument is much less fidelity-powered-sensitive than the sort of microphone allegedly used at the Waldorf-Astoria in this case. The Government is wrong, therefore, in saying in its brief (p. 56) that the microphone was "shielded". There was no "shielding" "mask of adhesive tape" at all; there was only a taping of the microphone for allegedly sharpening up the bugging function of the microphone, not at all to "shield" or "mask" it against unwanted sound. Also, the Government's story of the bath towel is exaggerated in the statement, wholly unsupported in the record, that the towel was "folded". Agent Durham did not say that the towel was folded, he said only that the towel "covered the microphone" and was pushed up along or under the apperture at the bottom of the door leading to Nebbia's room.

The Government's next statement in its portion of the brief (pp. 56-57) above quoted is that Kiere at all times exercised manual control over the tape recorder, i.e., that the recorder did not automatically actuate on to sound re-

ception. The Government's Record references for this statement will now be noted. R. 374 is merely a vague, *en passant* question and answer at the trial (not at the Waldorf pre-trial suppression hearing), in which agent Kiere was interrogated on direct examination (by the Government attorney as follows:

> "A. I see. Are you familiar at all with the mechanical aspects of the equipment that you were using? A. No, sir. Just whatever was explained to me by Agent Durham as to how to operate the tape recorder.
>
> Q. So what you did in effect was turn it on and turn it off as the occasion demanded? A. That's right?"

The government's next Record reference is R. 658-661. These four pages of Agent Kiere's testimony establish only that sounds, such as telephone calls made in the agents' room, were in fact picked up on the microphone tape, and that because there were defects in the automatic sound pick up "most of the time" Kiere operated the sound receiver manually.

This is a far cry from the Government's theory that the automatic sound pick up was *deliberately* not used; on the contrary the picture is one of general, all around mechanical unpredictability and ineptitude, in which Agent Kiere had no really effective control over the automatic sound actuation or the manual substitution therefor.

The Government's next record reference on this subject is R. 669-670, which in fact apparently establishes that on one occasion when Kiere turned off the tape recording machine the 'microphone and amplifier were still activated, there

being no negating by Kiere in connection with this incident that the defectively functioning automatically actuated voice recorder was working even though manually the machine was turned off.

The Government's next record reference is R. 3215-3216, which indicates only in a vague way that Kiere had problems with the mechanism.

The Government's next record reference is R. 3225-3226, where Kiere testified that because he had a cold and his coughing actuated the recorder, he operated the machine manually "whenever I was here", "practically every occasion".

The Government's next record reference, to the effect that the door to the bathroom in the Agents' room was ordinarily kept closed, we do not challenge (R. 373, 668-668a, 3215-3216).

The Government's next record reference relating to unwanted sounds of short wave radio, typewriter, tape play back, telephone, etc., will now be noted. R. 700 refers merely to a general statement by Kiere that he did not engage in typing when he heard something coming over on the microphone; obviously this does not take care of the problem of why the microphone did not pick up typing sounds during times when Kiere did not hear something coming over the microphone.

At R. 702-704 appears testimony by Kiere whose relevance to the Government's contention we cannot see at all.

The Government next cites R. 857-858, where Kiere testified that he did certain typing on one occasion which was

not during any eavesdrop conversation. We acknowledge that this item is probative *pro tanto,* but that is far from meeting the general problem of the several-days electronic surveillance period.

The Government's next record reference, R. 930-932, is really quite irrelevant to the topic for which the Government cites it, for at this place in the record the Government was trying to prove substantiation of its identification of Nebbia as having been the person in the Hotel room who was being electronically audited; in other words at this place in the testimony the Government was interested in showing that the telephones and radio of the Agents did get through to the Agents in their room because this was going to help the Government prove that through the coordination of the various Agents they were keeping tabs on Nebbia so as to identify him as engaging in bugged conversations. It is absolutely irrelevant for the Government to cite these pages of the record (930-932) for the point here in question.

The Government's next record reference is R. 594-595, which involves nothing more than an acknowledgement by Agent Kiere of one instance of telephone sound received on the tape record which was allegedly in the agents' room. A similar item, involving a telephone dialing sound, appears at the Government's R. 620 reference. To the same effect is the Government's reference to R. 660.

We have no wish to over-argue any point as between the Government and ourselves in regard to questions of who has accurately cited the record. But we cannot refrain—in concluding this presentation—from noting the really improper exaggerations and over-generalizations in several of the above record-analyzed statements in the Govern-

ment's brief at pp. 56-57. One such exaggeration is the Government's statement that "the recorder was operated manually by Agent Kiere *whenever* he wanted to make a recording"; as above noted, the record leaves this exaggeration of the Government hanging rather unattractively in mid-air; "whenever" means *always;* that is not the testimony. Similarly the Government exaggerates in its flat statement that "Finally, the short wave radio, typewriter", etc., "were used before and after, but not during the recording of conversations", and that "in the few instances where the telephone was used during a recording the tape contained noises evincing such use". These exaggerations of the Government are simply that, exaggerations.

The question of the ultimate truth of whether the microphone, in the form claimedly used by the Government, suspiciously failed to pick up more sounds in the Agents' room, is quite possibly dispositive of the issue of the honesty of the Narcotics Bureau testimony concerning this electronic bugging at the Waldorf-Astoria.

CONCLUSION

It is respectfully submitted that the relief prayed in the conclusion to our opening brief should be granted.

Respectfully submitted,

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